

Nauert, Uta

S/N: 10/709,597

REMARKS

Applicant notes that this application has been granted **SPECIAL STATUS**. Accordingly, Applicant appreciates early consideration of this Response in accordance with MPEP §702.02.

Claims 1-33 are pending in the present application. In the Office Action mailed December 17, 2004, the Examiner rejected claims 1-9, 19-20, 22-27, and 29-33 under 35 U.S.C. §103(a) as being unpatentable over Holland (USP 4,546,730) in view of Tseng (USP 6,418,950). The Examiner next rejected claims 32 and 33 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter. Claims 9, 11, 27-33 were also objected to because of certain informalities. Applicant appreciates the Examiner's indication of the allowability of claims 21 and 28.

Applicant has amended claims 9, 11, 30, 32, and 33 to correct for typographical errors. In claim 9, the word "is" was inadvertently included and has now been deleted. In claim 11, the word "feeder" has been replaced with the word "feeding" to accurately reflect its dependence upon claim 10. Claim 30 has been amended for grammatical correctness by replacing the word "are" with the word "is." Claim 32 has been amended to correct the inadvertent omission of the phrase "providing means" and thus to clarify the reference to "shade providing means." Finally, in claim 33, the word "providing" has been replaced by the word "retaining" to correct for an inadvertent typographical error. Applicant greatly appreciates the Examiner's diligence and attention in examining the claims.

Regarding the rejection of claim 1 under 35 U.S.C. §103(a), Applicant believes that the Examiner has overlooked express elements of the claim and that, as currently amended, the claim is patentably distinct from the cited references. Initially, claim 1 calls for "a post having first and second ends, wherein the first end extends upwardly from the feed container." The Examiner did not address this element of claim 1 in the rejection. However, the cited prior art does not teach a post having a first end which extends upwardly from a feed container. In fact, the stake 30 of Holland has an end which extends through the bowl 12, rather than extending upwardly from it. See Col. 3, lns. 4-17. The bowl 12 is specifically designed having a bearing 20 formed in its center to receive the stake 30 therethrough to anchor the apparatus to the ground. *Id.* Holland therefore teaches away from that called for in claim 1. Tseng, on the other hand, does not teach or suggest a feed container or bowl at all.

To further clarify the invention, Applicant has amended claim 1 to further define the present invention by including the clause "wherein the feed container is suspended from the first

Nauert, Uta

S/N: 10/709,597

end of the post." The bowl 12 of Holland, on the other hand, is attached about stake 30 in roughly the center of the stake. See Fig. 1, Col. 3, lns. 4-17. Therefore, Holland (1) does not teach or suggest a feed container that is suspended, and (2) does not teach or suggest a feed container that is suspended from an end of a post.

With regard to claim 19, the Examiner stated that "the container 12 of Holland *could* contain a liquid - such as a sugar solution - attractive to hummingbirds." (Emphasis in original.) In contrast, claim 19 explicitly calls for "a feeder having a reservoir constructed to feed hummingbirds." (Emphasis added.) The container 12 of Holland is a dog feeding bowl which has been partitioned into a volume for dog food 16 and a volume for water 18. Col. 2, lns. 62-66. Holland explicitly states that the bowl is constructed "for the convenience of the dog." Col. 3, lns. 23-24. This in no way constitutes a feeder "constructed to feed hummingbirds." Whether the bowl 12 of Holland could contain a sugar solution has no bearing on whether it is constructed specifically to feed hummingbirds, as claimed. Further, the bowl 12 is constructed to rest on the ground as a stabilizer for stake 30. Col. 3, lns. 12-17. This would actually present an inconvenience for a hovering bird. The bowl also represents a volume which is completely open on its upper side. See Fig. 1. This is contradictory to intuitive goals of hummingbird feeders in enclosing the sugar solution for protection from other animals, rain, etc. Thus, since the bowl 12 of Holland presents inconveniences for hummingbirds, and has no feature particularly suited for hummingbird feeding, Holland does not teach or suggest "a feeder having a reservoir constructed to feed hummingbirds." Therefore, since the cited references do not teach or suggest each and every element of claim 19, Applicant requests withdrawal of the rejection of claim 19.

With respect to the rejection of claim 27, the claim has been amended to incorporate allowable claim 28. Claim 28 has been canceled. Claims 29-33 are thus allowable pursuant to the chain of dependency.

The Examiner objected to the Abstract of the disclosure under MPEP §608.01(b) for containing the phrase "is disclosed." Applicant respectfully disagrees that the phrase "is disclosed" is a forbidden phrase or is legal phraseology. When something "is disclosed" it is simply "shown," "explained," or "made known." Applicant has enclosed a copy of The American Heritage Dictionary's definition of "disclosed." The term "disclosed" is simply stating what is there and is certainly not legal phraseology, but is merely proper English. The sentence would be incomplete and improper without the phrase. Additionally, the common usage of "disclose," "disclosed," or "disclosing" in an Abstract occurs in many abstracts, as evidenced by the Office's own database. Since 1976, of 2.6 million issued patents, nearly a third of a million

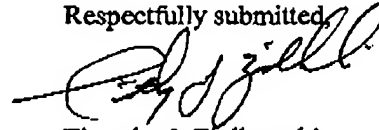
Nauert, Uta

S/N: 10/709,597

have some form of the root "disclos" in the Abstract. The undersigned has previously conferred with Group Director Richard Bertsch on this issue in another matter and it was agreed that the term is not a forbidden term in an abstract. In summary, the use the term "disclosed" is not legal phraseology but merely proper English and the objection to such is not proper and is not sustainable. Applicant respectfully requests withdrawal of the objection.

Since no other rejection remains, Applicant respectfully believes that the present application is in condition for allowance. As a result, Applicant respectfully requests timely issuance of a Notice of Allowance for claims 1-33. Applicant appreciates the Examiner's consideration of these Amendments and Remarks and cordially invites the Examiner to call the undersigned, should the Examiner consider any matters unresolved.

Respectfully submitted,



Timothy J. Ziolkowski
Registration No. 38,368
Direct Dial 262-376-5139
tjz@zpspatents.com

Dated: January 14, 2005
Attorney Docket No.: UTA6535.007

P.O. ADDRESS:
Ziolkowski Patent Solutions Group, LLC
14135 North Cedarburg Road
Mequon, WI 53097-1416
262-376-5170